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No. 84-375 (3)

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

JACK M. LEVIN, Petitioner

v.

Attorney Registration
and Disciplinary
Commission of the
Supreme Court of
Illinois, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

For the sake of brevity, Respondent will not provide sections in its brief for opinion below, jurisdiction, statute involved and statement of the case. Respondent will address in its argument those portions of those sections of Petitioner's brief which Respondent considers inaccurate or inadequate.

QUESTIONS PRESENTED

I. Whether Petitioner has failed to invoke federal jurisdiction pursuant to 28 U.S.C.§1257(3)

II. Whether Petitioner has raised a substantial federal question.

SUMMARY OF ARGUMENT

Petitioner has failed to demonstrate that this Court has jurisdiction to review the final disciplinary judgment of the Supreme Court of Illinois. Petitioner did not raise any federal constitutional claim until filing a petition for rehearing before the Supreme Court of Illinois. Petitioner has not demonstrated that Petitioner fits within the exception claimed by him as Petitioner had reason to expect that the Court would decide the case as it did.

Petitioner has failed to raise any substantial federal constitutional question which makes review by this Court necessary or appropriate. The only issue in fact raised by this petition is an issue of state law.

ARGUMENT

I.

PETITIONER HAS FAILED TO INVOKE FEDERAL JURISDICTION PURSUANT TO 28 U.S.C.§1257(3)

Petitioner is required to demonstate in his petition that this Court has jurisdiction to review the judgment of the Supreme Court of Illinois. Petitioner has failed to do so.

The judgment of the Supreme Court of Illinois imposing discipline upon a lawyer whom it licensed is a matter within its authority. Goldfarb v. Virginia State Bar, 421 U.S.773, 792 (1973). Lawyers have historically been "officers of the court". See, e.g., In re Primus, 436, U.S. 412, 422 (1978). In Illinois, the power to discipline an attorney is inherent in the Supreme Court of Illinois. In re Teitelbaum, 13 Ill.2d 486, 150 N.E.2d 873, cert. denied, 358 U.S. 881, rehearing denied, 358 U.S. 923 (1958). Disciplinary proceedings are original proceedings in the Supreme Court of Illinois. In re Taylor, 66 Ill.2d 567, 363 N.E.2d 845 (1977).

Petitioner concedes that in order to invoke the jurisdiction of this Court to review a constitutional claim not timely presented to the Supreme Court of Illinois, he must establish that his case fits within an exception (Petition, p.25). Petitioner first raised his federal constitutional claims of a denial of equal protection and due process in his petition for rehearing after the judgment of the Supreme Court of Illinois. As the Illinois Court denied the petition without entertaining the federal question (App.p.11), the general rule precludes review by this Court. Consolidated Turnpike Co. v. Norfolk & Ocean View Railroad Co., 228 U.S. 326, 334 (1912).

The exception claimed by Petitioner requires that Petitioner demonstrate that the opinion of the Supreme Court of Illinois supplied a new or unexpected basis for his recently asserted federal claim. Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 367 (1932). However, the exception applies only to cases where the federal claim could not have been anticipated and therefore the petition for rehearing afforded the first opportunity to raise the question. Missouri Insurance Co. v. Gehner, 291 U.S. 313 at 320 (1929).

Petitioner has failed to demonstrate any circumstances similar to cases in which this Court has applied the exception. This Court has applied the exception in cases in which a state Supreme Court suddenly reversed a long

standing precedent, issued an unprecedented construction of state law which effectively denied petitioner a forum in which to seek relief, or uniquely construe a state statute which infringed federal rights. Great Northern Railway, Id.; Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.SS. 673 (1930); Missouri Insurance Co., Id.

Petitioner's claim that he could not have anticipated that the Supreme Court of Illinois would increase the quantum of discipline from two years to three years and until further order of the Court is self-serving. It is refuted by the rules of the Supreme Court of Illinois, its prior disciplinary opinions and the record in Petitioner's disciplinary proceeding.

Petitioner knew from the institution of these proceedings that he faced the possibility of discipline, including the most severe sanction of disbarment. Supreme Court Rule 771, as amended on June June 1, 1980, provided that the Court could impose one of the following sanctions:

a) disbarment;
b) disbarment on consent;
c) suspension for a specified period of time and until further order;
d) suspension for a specified period of time; and
e) censure.

Paragraph c requires that after the conclusion of the specified period of suspension that a disciplined attorney establish fitness to resume the practice of law in a reinstatement proceeding prior to resuming the practice (App.A,C & D). Disbarment would have required a disciplined attorney to wait five years prior to filing a petition for reinstatement. Ill. Rev. Stat.1980, 110(A), S.Ct. Rule 767.

Petitioner cannot seriously claim that he did not have notice of the possibility of imposition of discipline as severe as suspension of three years and until further order of the Court. The Administrator, who is charged with prosecuting disciplinary cases, urged the most severe sanction of disbarment at every stage of the three-tiered disciplinary proceeding. (Petitioner's App.A, p.1-2, App.C, p.26.)

Petitioner had notice that the Court would consider the Administrator's position because the Court granted the Administrator leave to file exceptions, to file a brief and to make oral argument in support of the Administrator's position that disbarment was warranted (Petitioner's App.A, p.1-2) Petitioner's admitted failure to raise any federal question regarding the Court's authority to increase the sanction, especially in light of the Administrator's recommendation of disbarment, reflects nothing more than a conscious decision to avoid raising any federal question before the State Court.

Petitioner cannot assert seriously that he was not on notice that the Court reserved to itself the right to alter the quantum of discipline recommended by the Hearing and Review Boards. Long prior to the institution of this disciplinary proceeding, the Court had repeatedly held that recommendations of the Hearing and Review Boards as to the amount of discipline are advisory only and that the final responsibility for selecting an appropriate sanction rests with the Court. In re Neff, 83 Ill.2d 20, 413 N.E.2d 1282 (1980).

Prior decisions of the Supreme Court of Illinois, including the case in which Petitioner was suspended for three months for one act of neglect, In re Levin, 97 Ill.2d 205, 395 N.E.2d 1974 (1979), put Petitioner on notice that a suspension for a substantial length of time was likely. Petitioner has conceded that he neglected six additional matters entrusted to him by clients. Petitioner's continuation of his neglectful conduct made it likely that a suspension in excess of the two years recommended by the Hearing and Review Boards would be imposed. The Illinois Court had imposed one year suspensions upon attorneys who neglected two or three matters, but who had not been the subject of prior discipline. In re Taylor, 66 Ill.2d 567, 363 N.E.2d 845 (1977); In re Johnson, 93 Ill.2d 4441, 444 N.E.2d 153 (1932).

The petition appears to concede that Petitioner could have anticipated a three year suspension. While Petitioner erroneously concludes that the Court employed a mechanistic standard by adding six months suspension for each count of neglect (Petition, pp. 18, 53-59), a reasoned analysis would indicate that Petitioner's pattern of repeated neglect should be treated differently than two instances of neglect.

As a recidivist, Petitioner should have known that he was subject to a suspension until further order of the Court. In 1978 the Illinois Court imposed a suspension of six months and until further order of Court upon a lawyer whose neglect of one matter was willful and gross. In re Levinson, 71 Ill.2d 486, 376 N.E.2d 998. The decision put Petitioner on notice that the Supreme Court of Illinois is serious about protecting the public from attorneys whose cavalier conduct harm the public. The Court stated:

> ...we believe that future clients should not be exposed to the possibility of treatment such as the Sotos received until there appears greater reason than now exists to expect Respondent's adherence to normal professional standards.

Petitioner has failed to demonstrate that this Court has jurisdiction to review the final disciplinary judgment of the Illinois Court. Petitioner did not raise any federal constitutional claim until filing a petition for rehearing before the Supreme Court of Illinois. Petitioner has not demonstrated that Petitioner fits within the exception claimed by him as Petitioner had reason to expect that the Court would decide the case as it did.

II.

PETITIONER HAS RAISED NO SUBSTANTIAL FEDERAL QUESTION.

Mere allegations that a federal question exists will not confer federal jurisdiction. Rather, there must be a real substantive federal question on which the case turns in order to involve the jurisdiction of the Supreme Court. See, Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311 (1902). The petition will be denied if it appears that the federal question is merely formal, is so absolutely devoid of merit as to be frivolous, or has been explicitly foreclosed by decisions of this Court's to leave no room for real controversy. Id.

No genuine federal question has been raised by this petition. The only issue raised by Petitioner is an issue of state law which the Supreme Court of Illinois decided.

Petitioner does not claim that the sanction imposed is not proportionate to the misconduct proved. Petitioner's claim that the constitution requires the Illinois Court to make his sanction consistent with others who were found to violate the same disciplinary rule is without merit. (See Petition, pp. 36-479. This Court has rejected the notion that any such constitutional right of "proportionality" exists, even in a criminal proceeding where the sanction is death. Pulley v. Harris, 52 U.S.C.W. 4141,4143 (1983). While no such federal right exists, the Supreme Court of Illinois did impose discipline consistent with its prior cases.

Even if it could be said that a criminal defendant were entitled to this type of "proportionality," the concept should not appy to a disciplinary proceeding. A disciplinary proceeding is not criminal in nature. In re Daley, 549 F.2d 469, cert. denied (7th Cir. 1977) 434 U.S. 829 (1977). An attorney charged in a disciplinary proceeding is entitled to fundamental due proccess. The attorney is not entitled to the full panoply of rights afforded to an accused

in a criminal case. In re Harris, 93 Ill.2d 285, 443 N.E.2d 557, 560 (1982). Petitioner appears to recognize this principle (P.,p.38). Petitioner makes no claim that he did not receive notice and a full opportunity to defend himself.

Petitioner's alleged constitutional claim does not rise to the level of those involved in Schware v. Board of Bar Examiners, 353 U.S.232 (1957) or Konisburg v. State Bar of California, 353 U.S. 252 (1957). In Schware and Konisburg, this Court held that it was a violation of due process and equal protection rights for a state to exclude an applicant to the bar where there was no evidence adverse to the applicant. Petitioner, already a recidivist, concedes that the six instances of neglect provide a basis for discipline.

Petitioner is requesting this Court to review the decision of the Supreme Court of Illinois involving state law. The Supreme Court of Illinois exercised its long recognized and inherent authority in the discipline of one upon whom it had bestowed the privilege of being considered an officer of the Court. Goldfarb v. Virginia State Bar, 421 U.S.733, 792 (1975); In re Teitelbaum, 13 Ill.2d 586, 150 N.E.2d 873, cert. denied, 358 U.S.881, rehearing denied, 358 U.S.923 (1958).

Petitioner does not claim that the standards employed by the Supreme Court of Illinois in selection of an appropriate amount of discipline are unconstitutional (Pet., pp. 30, 37-40). Clearly, those standards exceed any federal constitutional requirement as they reflect the Illinois Court's effort to impose sanctions consistent with those imposed on other attorneys and consistent with all the circumstances of the case. In re Saladino, 71 Ill.2d 263, 275 N.E.2d 102 (1978).

The due process and equal protection provisions of the United States Constitution do not require more than the standard employed by the Supreme Court of Illinois. This Court has never held that attorney discipline must be imposed in a mechanistic fashion so that a violation of a certain disciplinary rule necessarily results in the imposition of the exact same quantity of discipline. As Petitioner concedes (Petition, pp.53-55), such a mechanistic approach might give an attorney less consideration than the effort of the Illinois Supreme Court to employ flexibility in selecting a consistent sanction after review of all the facts and circumstances.

Petitioner's only argument appears to be that the Court did not follow its guidelines in the selection of the sanction imposed (Petition, pp. 19, 53-59). Petitioner's argument is without merit.

The opinion of the Supreme Court of Illinois reflects that it did follow its guidelines. The Court carefully considered all of the circumstances surrounding Petitioner's misconduct. (App. A, pp.6-9) The Court attempted to balance the need to protect the public and profession from the continued harm inherent in Petitioner's repeated and willful neglect with the desire to impose consistent discipline. The Court also considered the unrebutted evidence of Petitioner's frequent and false statements to his clients.

The Supreme Court of Illinois appropriately concluded that Petitioner posed a greater threat than other attorneys upon whom it had imposed lesser sanctions. (Petitioner's App.A, pp. 5-8) The Court correctly noted that the amount of Petitioner's discipline was consistent with the one year suspension imposed in In re Johnson, 93 Ill.2d 441, 444 N.E.2d 153 (1982). Johnson, who had no history of misconduct, had neglected two maters. Petitioner's misconduct was far more pervasive and required a greater response by the Court.

Similarly, Petitioner's discipline is consistent with In re Chapman, 94 Ill.2d 484, 448 N.E. 2d 852 (1983). While Chapman was also a recidivist, only one instance of neglect was before the Court. The Court imposed a two year

suspension. As the Court concluded that alcoholism contributed to Chapman's neglect, the Court stayed the suspension and placed him on probation, a sanction consistently applied by the Court under those circumstances.

The Illinois decisions cited by Petitioner are clearly distinguishable from Petitioner's case. (Petition, pp.19,40) In re Kink, 92 Ill.2d 293, 442 N.E.2d 206 (1982); In re Taylor, 66 Ill.2d 567, 363 N.E.2d 845 (1977); In re Ahern, 23 Ill.2d 69, 177 N.E.2d 197 (1961). None of these cases involved a recidivist. Kink and Taylor involved one-half as many matters as the six matters neglected by Petitioner.

Petitioner's case is distinguishable because of the fact that he caused four of his clients to lose their rights to pursue their claims. In Kink, the administration of three probate estates were delayed, but no other prejudice occurred. In Taylor only one of the three matters resulted in prejudice to a client.

Petitioner's case is more serious than Kink, Taylor and Ahern in that Petitioner consistently misrepresented the status of matters to his clients. Only in Kink was there any evidence of misrepresentation. That was an isolated representation that Kink had mailed documents when he had not done so. In re Kink, 442 N.E.2d at 209.

The imposition of the requirement that Petitioner demonstrate fitness prior to his resumption of the practice of law is consistent with the decisions of the Supreme Court. In In re Levinson, 71 Ill. 2d 486, 376 N.E.2d 998 (1978), the Court suspended Levinson for six months and until further order of the Court for one aggravated instance of neglect. The Court reasoned in Levinson that in light of the willful neglect demonstrated by the attorney, that it could not certify him as fit to represent clients until he demonstated that he had become fit. The willful and repeated instances of neglect demonstrate that Petitioner poses a similar, but more pervasive threat to the public, profession and courts. In light of the gravity and pervasiveness of Petitioner's misconduct, the fact of his prior discipline, and the fact that Petitioner had not yet made restitution to the victims of his neglect, the Court appropriately imposed the condition that Petitioner demonstrate his fitness in a reinstatement proceeding prior to any return to the practice of law (App. A, pp.8-9)

The petition requests this Court to substitute its judgment for that of the Supreme Court of Illinois as to the amount of discipline required by Petitioner's misconduct. The petition apparently cites portions of the

transcript of the hearing in the disciplinary case favorable to Petitioner. The transcript is not included in the appendix. In light of the purpose of this brief, Respondent will not address each citation or correct the record.

Petitioner has failed to raise any substantial federal constitutional question which makes review by this Court necessary or appropriate. The only issue in fact raised by this petition is an issue of state law.

CONCLUSION

WHEREFORE, the Administrator respectfully requests that the Court deny this Petition for Writ of Certiorari.

Respectfully submitted,

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Diane Kristen, law student, assisted in the preparation of this brief.